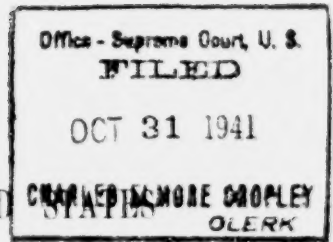


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 57

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SCAIFE COMPANY,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF FOR THE PETITIONER.

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✓ SAMUEL KAUFMAN,  
*Counsel for Petitioner.*

S. LEO RUSLANDER,  
JAMES M. MAGEE,  
*Of Counsel.*

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**Opinions Below.**

The opinion of the Board of Tax Appeals is reported at 41 B. T. A. 278. The opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 572.

**Jurisdiction.**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (Title 28, Code of the Laws of the U. S., Section 347) to review the decision of the United States Circuit Court of Appeals for the Third Circuit entered on January 31, 1941.

**Statement of the Case.**

On July 29, 1936, there was filed on behalf of petitioner a Federal capital stock tax return for the year ended June

30, 1936, in which the declared value was by mistake stated in an amount (\$600,000.00) lower than had been determined (\$1,000,000.00) by the officers of petitioner who had charge of the matter. Immediately on discovery of the error on September 3, 1936 a correct return was prepared (declaring the higher amount) and lodged with the Collector accompanied by an explanation of the error and a remittance to cover the additional tax (Opinions below, R. 19 and 25; Exhibit A, R. 17).

The Collector refused to accept the corrected return for filing but transmitted it to the respondent as part of the record and returned to petitioner the amount which had been tendered in payment of the additional tax (R. 20).

In a proceeding before the Board of Tax Appeals for redetermination of deficiencies in 1936 taxes which the respondent had asserted, petitioner contended that its excess profits tax should be computed on the basis of the higher capital stock value declared in the corrected return. The Board of Tax Appeals concluded that petitioner was bound by the lower value stated in the return filed in July, 1936. The Board supported its conclusion with the argument (1) that an amended capital stock tax return filed after expiration of the unextended due date specified in Section 105(d) of the Revenue Act of 1935, 49 Stat. 1017, is not sufficiently timely to fall within the rule of the Supreme Court in *Haggar Co. v. Helvering*, 308 U. S. 389, and (2) that the mistakes of its officers do not relieve petitioner of the consequences of its failure to comply with the law (Opinion of the Board, R. 19).

On Review, the Circuit Court of Appeals affirmed the Board (R. 28-29), relying largely on the decision of the Supreme Court in *Riley Investment Co. v. Commissioner*, 311 U. S. 55. The Circuit Court of Appeals omitted any mention of the point urged by the petitioner (and discussed on brief by the respondent) to the effect that an

amended return filed within the period to which the statute permitted an extension was timely within the rule of the *Haggar* case, even though the permitted extension had not been sought or obtained by the petitioner.

### **Specification of Errors.**

The court below and the Board of Tax Appeals erred in failing to hold that:

1. The term "first return" as used in Section 105(f) of the Revenue Act of 1935 (c. 829, 49 Stat. 1017) includes an amended capital stock tax return filed beyond the unextended due date but before expiration of the period for which the Commissioner was empowered by the Statute (Section 105(d)) to grant an extension.

2. A declaration of value stated by mistake on a timely "first return" in an amount lower than previously determined by the taxpayer's officers, may be superseded by the correct declaration of value made in a late amended return filed promptly after discovery of the error.

### **Summary of Argument.**

Under the decision of the Supreme Court in *Haggar Co. v. Helvering*, 308 U. S. 389, the phrase "first return" as used in Section 105(f) of the Revenue Act of 1935 (c. 829, 49 Stat. 1017) includes a timely amended return. An amended return is timely when filed beyond the unextended due date but before expiration of the statutory sixty-day extension. This rule is particularly applicable where, as here, the declaration of value previously (admittedly timely) filed was by mistake stated in an amount lower than had been determined by the taxpayer's officers and the amended return was filed promptly after discovery of the error.

## **ARGUMENT.**

Determination of the petitioner's liability for excess profits tax for the year 1936 depends upon the amount of the declared value of its capital stock for the year ending June 30, 1936. It is petitioner's contention that the declared value was the \$1,000,000.00 shown in the return filed September 3, 1936, and not the \$600,000.00 shown on the return filed July 29, 1936.

### **The Declaration of \$1,000,000.00 Filed September 3, 1936 Was "Timely".**

The decision of the Supreme Court in *Haggar Co. v. Helvering*, 308 U. S. 389, held to be timely a revised declaration of value offered before expiration of the *extended* due date, but it does not follow as concluded by the Board and the court below that a revised declaration offered after an unextended due date is "untimely."

The Circuit Court of Appeals grounded its conclusion on the decision of the Supreme Court in *J. E. Riley Investment Company v. Commissioner*, 311 U. S. 55. In that case, however, the amended return was filed more than eleven months after the original due date, and the opinion of the Supreme Court pointed to the fact that the statute permitted an extension for not exceeding six months.

In the present case, the return was due July 31, 1936, but the statute empowered the Commissioner to grant an extension not exceeding sixty days. The original return was filed July 29, 1936 and the amended return was filed September 3, 1936, less than sixty days later.

The nexus of petitioner's argument is that the statutory period for filing the first return includes not only the "one month after the close of the year" but also the additional sixty days for which the Commissioner was empowered to extend the filing time. This position finds inferential basis

in the following paragraph from the opinion in the *Riley* case, by Mr. Justice Douglas:

“We think that petitioner’s amended return, filed on March 3, 1936, was not a ‘first return’ within the meaning of Sec. 114(b)(4). By Sec. 53(a)(1) of the 1934 Act, the return was due on or before March 15, 1935. By Sec. 53(a)(2) *the Commissioner was empowered to grant a reasonable extension for filing returns but, so far as applicable here, not exceeding six months.* *Haggar Co. v. Helvering*, 308 U.S. 389, would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a ‘first return’ within the meaning of Sec. 114(b)(4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return.” (Emphasis supplied.)

In the *Haggar* case, as well as in *Glenn v. Oertel Co.*, 97 F. (2d) 495, and *Philadelphia Brewing Co. v. U. S.*, 27 Fed. Supp. 583 (both cited with approval by the Supreme Court in the *Haggar* case) corrected returns filed in September, 1933 were held to be timely. The only difference from the present case is that in 1933 the Commissioner of Internal Revenue had granted an extension to September 29 as permitted by the Statute, whereas petitioner did not avail itself of its right to obtain an extension to September 29, 1936 as provided in the Statute and in Article 37 of Regulations 64. This difference is not substantial enough to make petitioner’s return filed September 3, untimely, returns in two of the cited cases having been filed on later dates in September.

The respondent’s insistence upon compliance with the Regulations as a prerequisite to inclusion, in the statutory period for filing, of the statutory extension period is like-

wise without substance. In the court below he argued that if he proceeded along the lines of petitioner's contention "the due date of all capital stock returns would be automatically postponed for another sixty days directly contrary to the statute and regulations."

This argument disregards the distinction between the timeliness of an original return and the timeliness of an amended return. The extreme result of petitioner's contention would simply be that the due date of all amended capital stock returns would be automatically postponed for another sixty days. Such a construction would not be contrary to the statute and the regulations.

The statute and the regulations are adequately served by the penalty provisions which would be enforced in those cases where the taxpayers failed to file returns within the thirty-day period without first obtaining extensions.

The respondent has recently given recognition to the interrelationship of the penalty provisions and the extension provisions of the statute in T.D. 5069, promulgated September 24, 1941 under the Revenue Act of 1941, which provides in Section 301(c) with reference to capital stock tax returns for the year ending June 30, 1941 that "the extension may be for not more than ninety days." In granting a general extension to all taxpayers it is provided in the Treasury Decision that "the period within which returns of capital stock tax for the year ended June 30, 1941, *may be filed without assertion of penalties for delinquency*, as extended to September 29, 1941, by Treasury Decision 5061, approved July 21, 1941, is hereby further extended to October 29, 1941."

In the view which petitioner urges as the proper construction of the statute, if such a general extension were not granted, taxpayers who had filed returns prior to September 29, 1941 could, nevertheless, have filed amended returns to October 29, 1941, but taxpayers who had not



filed in September (or prior) would be subject to penalties for delinquency upon their filings in October.

In short, taxpayers may universally file their original declarations of value by original or amended returns at any time within the statutory period including the period for which an extension is permitted, but those taxpayers who neither file a return nor obtain an extension before expiration of the unextended due date will be subject to the penalties for delinquency.

### **The Declaration of \$600,000.00 Must Be Ignored.**

It is petitioner's alternative contention that, if taxpayers may not universally amend their capital stock tax returns at any time within the statutory extension period, the correct declaration of value made to supersede a mistake on a timely "first return" must be regarded as the original declaration.

The fact is uncontroverted that petitioner intended and determined prior to July 29, 1936 to declare \$1,000,000.00 as the declared value of its capital stock, so that the amount of \$600,000.00 erroneously inserted in the return filed July 29, 1936 was not petitioner's declaration of value.

The question here involved is identical with the question in the case of *Lerner Stores Corporation*, Commissioner, 118 F. (2d) 455, in which certiorari was recently granted by the Supreme Court. Paraphrasing the essence of the opinion of the Circuit Court of Appeals in the *Lerner* case, the present case does not involve a change of judgment by the petitioner but presents a situation where the taxpayer has made but one declaration of value and has inaccurately reported it to the Commissioner due to an error of one of its officers. The correction of such an error cannot thwart the purposes of the statute or injure the interests of the Government.

While the mistake in the *Lerner* case involved a clerical mistake in misplacing a decimal and the Court there stated that "strict proof should be required to establish that the value stated in a return resulted from a clerical mistake," the mistake in the present case involved with equal clarity no change of judgment by the taxpayer. The petitioner has met the burden of proving an error and the Court below found that the value of \$600,000.00 was declared by mistake and that the error was attempted to be corrected promptly after its discovery (R. 26).

### Conclusion.

If the petitioner be not permitted to have its excess profits tax liability determined on the basis of the declared value of \$1,000,000.00, which was the amount which petitioner at all times material intended to declare, petitioner will, in the language of the Supreme Court in *Haggar Co. v. Helvering* "have been denied an opportunity to make a declaration of capital stock value which it was the obvious purpose of the statute to give \* \* \* for no other reason than that the declaration appeared on an amended instead of an unamended return \* \* \*. The words of the statute, fairly read in the light of the purpose, disclosed by its own terms, require no such harsh and incongruous result."

Respectfully submitted,

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## APPENDIX. .

Revenue Act of 1925, c. 829, 49 Stat. 1014, as amended:

### SEC. 105. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of \$1.00 for each \$1,000 of the adjusted declared value of its capital stock.

. . . . .

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, insofar as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

. . . . .

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). • • •

Treasury Regulations 64, promulgated under the Revenue Act of 1935:

ART. 37. *Time for filing return.*—(a) *General.* Returns must be filed with the collector of the district in which is located the principal place of business of the corporation, or, if it has no principal place of business in the United States, then with the collector at Baltimore, Md., during the month of July next following the end of such year, unless the time for filing is officially extended.

• • • • •

(b) *Extensions of time.*—The Act authorizes the Commissioner to extend, under such rules and regulations as he may prescribe with the approval of the Secretary, the time for filing returns and paying taxes, subject to the limitation that no such extension shall be for more than 60 days. Pursuant thereto, the respective collectors of internal revenue are hereby authorized to grant, under the conditions prescribed herein, extensions of time for filing capital stock tax returns and for payment of such taxes. In the exercise of such authority, collectors of internal revenue shall grant an extension of time for filing the return and paying the tax, only: (1) upon a written application under oath filed on or before the statutory due date of the return and showing reasonable cause for the extension; (2) for such reasonable period as may be required by the circumstances, not to extend in any case beyond the 29th day of September next following the close of the taxable

year; (3) with the provision that interest at the rate of 6 per cent per annum shall be paid upon the tax from the statutory due date (July 31) to the date of payment of the tax; and (4) in accordance with such procedure as may be prescribed from time to time by the Commissioner. The determination whether an application presents reasonable cause for an extension depends upon the particular circumstances of each case. Ordinarily, a showing of sickness or absence of the officers charged with the responsibility of making the return, or of other circumstances beyond the control of the corporation which prevent the filing of a proper return within the time required by law, constitutes reasonable cause warranting an extension. Accordingly, a corporation desiring an extension of time for filing its capital stock tax return and paying the tax must file with the collector on or before the statutory due date of the return an application under oath setting forth the reasons necessitating an extension and stating the time for which the extension is requested. In every case in which an extension is allowed, a copy of the collector's letter granting the extension shall be attached to the return when filed. For general provisions relating to penalties and interest, see article 82.

. . . . .

ART. 82. *Penalties and interest.*—The Act provides that if the tax is not paid when due there shall be added, as part of the tax, interest at the rate of 6 per cent per annum from the time when the tax became due until paid. The due date of the tax is the last day of July next following the close of the taxable year. If payment is deferred beyond the due date interest will accrue from that date irrespective of the reason for the delay in payment and whether or not the time for filing the return has been extended.

Failure to file a return on or before the last day of July next following the close of the taxable year, or in case an extension has been granted, before the expiration of the period of extension, causes to accrue the following graduated scale of penalties: 5 per cent of the amount of the tax if the failure is for not more than 30 days, with an addi-

tional 5 per cent for each additional 30 days, or fraction thereof, during which failure continues. Such penalties may not, however, exceed 25 per cent in the aggregate. When it is shown that the failure to file was due to a reasonable cause and not to willful neglect, no such addition to the tax shall be made.

In addition to such interest and penalties, liability for penalties is incurred under provisions of law applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, which penalties are also specifically made applicable in respect of taxes imposed by section 105 of the Revenue Act of 1935, in so far as not inconsistent with the latter section.

If an assessment is made of tax, penalty, or interest, and payment is not made within 10 days after the date of issuance of Form 17 (First notice and demand) based on assessment approved by the Commissioner, there will accrue a penalty of 5 per cent of the total assessment, and interest at the rate of 6 per cent per annum upon the entire assessment from ten days after issuance of Form 17 until date of payment.

If a false or fraudulent return be willfully made, the penalty under section 3176 of the United States Revised Statutes, as amended, is 50 per cent of the total tax due for the entire period involved including any tax previously paid.

Under section 1114 of the Revenue Act of 1926, any corporation which wilfully fails to pay any tax due, file a return, or keep records, or attempts in any manner to evade or defeat the tax, is subject to a fine of \$10,000, or imprisonment, or both, with costs of prosecution. For willful failure to pay, or a willful attempt in any manner to evade or defeat the tax, the statute also imposes a penalty equal to the amount of the tax not paid, which penalty is assessable in the same manner as the tax. These penalties apply to an officer or employee who, as such officer or employee, is under a duty to perform the act in respect of which the violation occurs.